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20 October 1950

MEMORANDUM: FOR THE FILES

SUBJECT: Subpoena of CIA Records by Subversive Activities Control Board

1. Section 13 of the Internal Security Act of 1950 gives to the Subversive Activities Control Board, created by the Act, the power to: "... require by subpoena the attendance and testimony of witnesses, and the production of books, papers, correspondence, memoranda, and other records deemed relevant to the matter under inquiry... Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

2. Cases where the Board itself or the Attorney General desires the production of CIA records present no difficulty, as the question of the advisability of production would be handled by consultation within the executive branch. However, a problem arises where an organization or individual in a proceeding before the Board requests that CIA records be produced.

3. As a practical matter, the Director may safely refuse to obey a court order requiring him to produce CIA records before the Board, on the ground that their disclosure would be prejudicial to the public interest. So far as can be ascertained, no attempt has ever been made to cite the head of an executive department for contempt for failure to obey a court order to produce documents. This stems from the doctrine of separation of powers between the executive, judicial and legislative branches of government.

4. There have been cases where an official or employee of an executive department has been ordered by a federal court to produce records, has even been adjudged in contempt for failure to do so. However, no instances have been found where compulsion was brought to bear to force compliance.

5. It is true, of course, that CIA's refusal to supply the records subpoenaed may cause the Government to lose its case, due to prejudice to the other party amounting to denial of a fair trial. Thus, in several cases in the Second Circuit, convictions were reversed on appeal on the ground that the defendant was entitled to the production of government records since it was apparent that these records related directly to the charges against him. United States v. Andolschek, 142 F. 2d. 503 (1944), United States v. Beckman, 155 F. 2d. 580 (1946), United States v. Grayson, 166 F. 2d. 863 (1948).

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6. As will be shown below, it is not likely that a District Court would issue an order requiring CIA to produce records where the agency has refused, in the public interest, to obey a subpoena duces tecum issued by the Board.

7. The general rule that executive agencies may refuse, in the public interest, to produce records is stated as follows in 40 Op. Atty. Gen. 8, 49 (1941):

> "This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and can not require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine." (citing cases)

8. An employee of an executive department may base his refusal to produce records on a departmental regulation. In United States v. Ragen, 180 F. 2d. 321 (petition for cert. filed May 22, 1950), and Exparte Sackett, 74 F. 2d. 922 (9th Cir., 1935), agents of the F.B.I. were upheld in their refusal to produce investigative records. The agents relied on Department of Justice regulations prohibiting the disclosure of records except in the discretion of the Attorney General. The same holding was made in Boske v. Comingore, 177 U.S. 459, which involved a Treasury Department regulation. It was stated by the courts in these cases that the departmental regulations had the force of law since they were issued pursuant to R.S. 161 (5 U.S.C. § 22). which provides:

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distrubution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

Similarly, the CIA Regulations provide for the custody and use of intelligence information, and CIA personnel may not make disclosures except as there provided. (See CIA Regulations 50-VIII and 50-V.)

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10. Also, in cases where state secrets are involved, CIA may apparently decline to produce records, relying on the constitutional prerogative of the President to conduct the foreign relations of the nation, in the course of which he must necessarily have in his possession confidential information which he is not obligated to divulge. In the case of Chicago Air Lines v. Waterman, 333 U.S. 103, the court said:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

11. As alluded to above, there have been cases where the courts adopted the position that an executive department employee should be required to produce official records. These cases have involved criminal prosecutions brought by the United States in which it appeared that the suppressed records related directly to the charges against the defendent. In most of them the holding is limited to reversal of a conviction, due to suppression of important evidence, and the rest is dicta; e.g., the Andolschek, Beekman, and Grayson cases, supra. In other cases, a government employee was convicted of contempt for refusal to produce records, but the conviction was reversed on appeal; e.g., the Ragen and Sackett cases, supra. The various cases on this subject are discussed in Parsons v. State, 38 So. 2d. 209 (1948), and those which adopted the position that government records should be produced are distinguished. The same has been done in the Ragen case, supra, where the Andolschek and other similar cases are distinguished on the theory that the government department involved had waived its privilege of nondisclosure of records under the facts of each case. Those cases are further distinguished in the situation of CIA since they did not involve any statutory provision for the protection of

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intelligence sources, nor were the functions of the executive as the organ of foreign affairs or the Commander-in-Chief of the Armed Forces involved.

12. Where the Department of Justice or some other government agency is ordered to produce information in its files which came to it from CIA, the department in question can refuse to do so in the public interest, and pursuant to its own security regulations, in accordance with the rulings in the Ragen and Sackett cases above. In any event, no employee of the department would be compelled to produce the records, as pointed out above. CIA could also interpose an objection on the basis of the Director's responsibility to protect intelligence sources and methods. CIA could probably not rely, in such a case, on its own internal regulations, because of the doctrine of the case of Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Haw. 1947), where Department of Justice investigative records in War Department files were ordered to be produced despite objection by Justice on the ground of its own security order No. 3229.

13. In summary, no CIA official or employee would likely be ordered by a District Court to produce records before the Subversive Activities Control Board, where refusal to comply with a subpoena duces tecum issued by the Board was based on reasons of public interest. If an order for production of records should be issued by a District Court, the Director or any employee of CIA would not be forced to obey the order.

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